BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WELDON AARON	)	
Claimant	)	
VS.	)	
	)	DOCKET NO. 158,858
GARY L. BAILEY, D/B/A INDEPENDENT HAULERS	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	
	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

ON the 13th day of January, 1994, the application of the respondent and Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Assistant Director William Morrissey, dated December 13, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, G. Knute Fraser of Wichita, Kansas. Respondent and insurance carrier appeared by their attorney, W. John Badke, II of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set out in the Award of the Assistant Director.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Assistant Director including the agreement that the Kansas Workers Compensation Fund will be responsible for payment of seventy-five percent (75%) of the compensation, medical expense, and costs of this claim.

ISSUES

(1) What is the claimant's average weekly wage?

(2) What is the nature and extent of claimant's disability?

(3) Is claimant entitled to future medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The claimant's average gross weekly wage for the purpose of computing compensation benefits in this case is determined to be $328.68.

The claimant in a workers compensation case has the burden of proof to establish his right to an award of compensation by proving the various conditions on which his right to a recovery depends. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

One of the conditions that has to be proved by the claimant is the claimant's gross average weekly wage at the time of his accidental injury. In the instant case, the claimant was paid by the respondent on the basis of twenty-two percent (22%) of the gross revenue that the truck the claimant was driving earned.

Consequently, K.S.A. 44-511(b)(5) determines the calculation of an employee's average gross weekly wage when the employee's money rate is fixed on a percentage basis and such statute provides in pertinent part:

> "If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat rate basis for performance of a specific job, or on any other basis where the money rate is not fixed by the week, month, year, or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of weeks so employed, up to a maximum of twenty-six (26) calendar weeks immediately preceding the date of accident, divided by the number of weeks employed, or by twenty-six (26) as the case may be, plus the average weekly value of any additional compensation and value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. . . . In making any computation under this paragraph (5), work weeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire work week because of illness or injury shall not be considered."

The Assistant Director found herein that the claimant's average gross weekly wage was $350.00 based on the claimant's testimony and a disability claim form which was entered into evidence. The claimant has argued at various times in these proceedings that his average gross weekly wage should be either $350.00, $400.00, or $500.00. It is the respondent's position that the canceled company checks submitted by the respondent and introduced into evidence in this case in the total amount of $3,010.00 is the only amount of money paid to claimant for his services during the weeks that he worked for the respondent. The respondent, therefore, contends that the average gross weekly is $145.41 which is found by dividing the actual number of weeks worked by the claimant of 20.70 weeks into $3,010.00. The respondent contends that the claimant was employed by the respondent a total of 24.41 weeks and the actual number of weeks worked of 20.70 is found by subtracting 3.71 weeks not worked by the claimant because of non-work-related health problems.

Upon review of the whole evidentiary record, the Appeals Board finds the claimant's average gross weekly wage is $328.68 based on the following evidence:

(a) The claimant was employed by the respondent from September 21, 1990, through February 20, 1991, for a total of 21.86 weeks and was absent from work because of non-work-related health problems from December 3, 1990, through January 17, 1991, for a total of 5.14 weeks. For purposes of calculating the average gross weekly wage, the claimant worked 16.72 weeks for the respondent.

(b) Company checks paid to the order of the claimant entered into evidence by the respondent covering a period from September 21, 1990, through March 8, 1991, totaled $3,010.00 for work performed through February 20, 1991.

(c) Claimant testified he was paid the following amounts in addition to the company checks entered into evidence by the respondent:

(i) Paid three times by the respondent by personal checks in the amounts of $30.00 to $75.00, which would average $52.50 for a total of $157.50.

(ii) Paid in cash by the respondent from $75.00 to $100.00 per week that the claimant worked which would be an average of $87.50 per week for 16.72 weeks worked for a total of $1,463.00.

(iii) Paid by Becker Corporation, the respondent's contract lessor, three checks at $75.00 per check, for a total of $225.00.

(iv) Respondent purchased a car for the claimant for $500.00 which was deducted from amounts owed claimant prior to the respondent paying the claimant.

(v) Respondent provided six months automobile liability insurance for the claimant in the amount of $140.00 which was deducted prior to the respondent paying the claimant.

The foregoing evidentiary facts support a finding that the claimant was paid by the respondent a total amount of $5,495.50. An average weekly wage of $328.68 is determined by dividing the total amount of money paid the claimant by the respondent in the amount of $5495.50 by the 16.72 weeks the claimant actually worked for the respondent.

(2) As a result of a personal injury by accident arising out of and in the course of his employment with respondent, Gary L. Bailey, d/b/a Independent Haulers, the claimant, Weldon Aaron, is permanently and totally disabled on account of such injury. He is completely and permanently incapable of engaging in any type of substantial and gainful employment.

The claimant, Weldon Aaron, was employed by the respondent, Gary L. Bailey, d/b/a Independent Haulers, as an over-the-road semi-truck driver operating a tractor-trailer rig delivering gas products consisting of gasoline, oil, hot tar, and propane. Claimant's delivery route was mainly between refineries located in Wichita, Kansas, and El Dorado, Kansas. The claimant started working for the respondent sometime around September 21, 1990, and worked until day of his injury on February 20, 1991. The truck that the claimant drove was owned by the respondent, however, the trailers were owned by Becker Corporation, the company the respondent contracted with to obtain loads.

In addition to driving the semi-truck for the respondent, the claimant also had the responsibility of doing some maintenance on the truck which consisted of changing oil and lubricating the truck as needed. On February 20, 1991, at the direction of the respondent, the claimant was placing a truck tire on the axle of a truck when the tire, which weighed between 175 - 200 pounds, slipped off the axle. In an effort to keep the heavy truck tire from falling on him, the claimant tried to catch the tire. At this time, a sharp pain and pressure was felt in his lower back. Immediately he doubled over onto the ground because of the extreme pain in his back.

As a result of the claimant's back injury, he has not returned to his employment with the respondent. Respondent refused to provide medical treatment as requested by the claimant until the claimant obtained an attorney to represent him. He did go to a chiropractor on his own on two or three different occasions for treatment without relief.

Finally, on March 26, 1991, the claimant was first seen for medical treatment provided by the respondent by Forney W. Fleming, M.D., an orthopedic surgeon, in Wichita, Kansas. Dr. Fleming found that the claimant had the following extensive past medical history:

(a) 1966, left knee operated on to repair tear in lateral meniscus

(b) 1968, herniated disc excised at the L5-S1

(c) June of 1973, operated on for another herniated disc at L5 area

(d) July of 1973, again operated on because of a continuing back problem.

(e) 1977, operation at the Kansas Medical Center to remove scar tissue around a nerve root in an effort to relieve continuing pain in the claimant's leg

After the initial examination, Dr. Fleming diagnosed the claimant as having an acute lumbar strain, superimposed on degenerative disc disease, post-status multiple back operations. Conservative treatment was provided by Dr. Fleming for the claimant in the form of no-work, outpatient physical therapy, narcotic pain medication with codeine, anti-inflammatory medication, heat treatment, and TENS unit for pain relief. Dr. Fleming saw the claimant on six occasions from March 26, 1991, through August 5, 1991. Claimant was never considered a candidate for surgery because the success rate of repetitive back operations drops off precipitously. Dr. Fleming's treatment of the claimant produced minimum improvement, as the claimant continued to have complaints of a considerable degree of back discomfort and very limited mobility.

Dr. Fleming opined that the claimant's accident of February 20, 1991, aggravated his pre-existing impairment that he had suffered from previous back injuries and subsequent surgeries. With respect to functional impairment, Dr. Fleming concluded that the claimant had a total of twenty percent (20%) of the whole body with fifteen percent (15%) related to his pre-existing back condition.

Prior to the claimant's latest injury, Dr. Fleming would have imposed restrictions of lifting between twenty-five (25) and fifty (50) pounds and a limit on bending and twisting not to exceed ten (10) repetitions per hour. Present work restrictions would require a job where the claimant would be able to sit down, his hours would have to be limited depending on his pain, perhaps limited from two to four hours per day, no lifting, no bending, no twisting, and the claimant would have to secure a job that would give him an opportunity to occasionally stretch and stand. During the claimant's last visit to Dr. Fleming on August 5, 1991, Dr. Fleming concluded that the claimant was completely disabled. When Dr. Fleming was asked his opinion within a reasonable degree of medical probability as to whether or not the claimant could function in the open labor market, Dr. Fleming replied:

> "Well, based on the last time I saw Mr. Aaron, which was August 5, 1991, I do not feel that this gentleman was capable of any type of employment."

Additionally, in a letter dated September 9, 1991, to claimant's attorney, Dr. Fleming concluded:

> ". . . at the current time, it is my feeling that Mr. Aaron is not capable of performing any type of work activities. It is quite unlikely that that condition will change in the future."

Dr. Fleming further testified that he felt that the claimant was probably not going to be capable of any type of gainful employment.

The claimant testified that Dr. Fleming related to him at the time of his release that he did not think there was anything anybody could do for him and he was not a good candidate for school because he could not sit or stand for long periods of time. Claimant recalled that Dr. Fleming imposed restrictions of lifting five (5) pounds with no bending or stooping.

At the present time, the claimant is unable to sit for very long, muscle spasms continue in the low part of his back, and pain continues to radiate down his leg. Since the accident, the claimant walks with a limp and has fallen a time or two from his leg collapsing under him. Pain medication in the form of Ibuprofen is taken for his continuing pain. He has not been employed since the accident. His present condition is worse than his condition was in the 1970's after the four back operations. He is despondent and has been advised to seek counseling for his depression.

As a result of the claimant's previous back injuries and subsequent operations, he was not employed from 1973 until 1981. As previously noted, the claimant's last back operation occurred in 1977 when a Dr. Jacobs at the Kansas University Medical Center in Kansas City, Missouri, removed scar tissue which was impinging on a nerve root. From 1977 until he resumed gainful employment in 1981, the claimant received conservative treatment in the form of physical therapy from Dr. Mitchell at the Osteopathic Hospital in Wichita, Kansas.

Eventually, the claimant rehabilitated himself to a point in 1981 where he was free from pain and could generally function without any particular problems. He returned to gainful employment as a salesman for Cherry Orchard Furniture for a period of fourteen (14) months in 1981, earning on an average of $300.00 per week. When asked what kind of problems he was having with his back when he went to work for Cherry Orchard Furniture, he replied:

> "I was having none at that time, in fact I was in pretty good shape. I had got myself back in good shape and was ready to go out and tear the world up again."

Commencing in 1982 and continuing to 1987, the claimant was in business with his father doing painting and remodeling, which was strenuous work requiring repetitive lifting, bending, and stooping. He earned $400.00 to $600.00 per week on an average and testified he had absolutely no problem with his back.

In 1987, in an effort to increase his earnings, he purchased a semi-tractor for over-the-road hauling. He successfully completed a truck driving and safety school in 1987. Completion of this school enabled him to secure a job hauling for Sundance Transportation, Wichita, Kansas. He drove for Sundance until January of 1990 when it went bankrupt. The next truck driving job he was able to secure was the one driving for the respondent. In order to physically qualify for this truck driving job, the claimant successfully passed both a Department of Transportation physical and a company physical required by Becker Corporation. He fully disclosed, both to the doctor performing the physical and also to the respondent, his previous back injuries and subsequent surgeries.

At the request of the respondent, Robert A. Rawcliffe, Jr., M.D., a board certified orthopedic surgeon, in Wichita, Kansas, examined the claimant on May 8, 1992. Dr. Rawcliffe took a detailed medical history from the claimant and also had the benefit of the claimant's prior medical records. After Dr. Rawcliffe performed the physical examination, he concluded that the claimant represents an example of failed back syndrome or chronic pain syndrome. Dr. Rawcliffe imposed permanent restrictions to sedentary work category with occasional lifting of ten (10) pounds and frequent lifting of no more than lightweight articles. In accordance with the AMA Guides, Third Edition, Revised, Dr. Rawcliffe opined that the claimant has, as a result of his injury in February of 1991, a twenty-five percent

(25%) impairment of function. Additionally, claimant is severely depressed and Dr. Rawcliffe recommended a psychiatric evaluation and treatment.

In reference to the claimant's physical condition prior to February of 1991, Dr. Rawcliffe opined that fifteen percent (15%) of the claimant's present twenty-five percent (25%) functional impairment, in accordance with the AMA Guides, Third Edition, Revised, is attributed to the claimant's previous back injury and subsequent surgeries. Dr. Rawcliffe would have restricted the claimant prior to February of 1991, to light-work category jobs involving occasional lifting of up to twenty (20) pounds, frequent lifting of up to ten (10) pounds, and avoiding repetitive bending and stooping. Dr. Rawcliffe is of the opinion that the restrictions placed on the claimant by Dr. Kaufman after the 1973 back surgeries of no lifting over thirty-five (35) pounds, and no repeated lifting, bending, or stooping, were reasonable and took into the account the overall condition of the claimant's back.

Two vocational rehabilitation experts testified in this case concerning the issue of work disability. The first to testify was Kenneth E. Ogren, Director of the Return to Work Centers, a division of Menninger Clinic in Topeka, Kansas. Mr. Ogren, at the request of the respondent, performed a vocational assessment of the claimant on June 9th and 10th, 1992. Such assessment included a personal interview and testing of the claimant. Extensive medical records describing the claimant's past and present injuries and treatment were also supplied to Mr. Ogren .

Mr. Ogren's vocational evaluation process took two days to complete. At the time of the evaluation, claimant was forty-three (43) years of age, had attended high school until the tenth grade and had subsequently obtained a GED in 1969. Prior to his latest injury, the claimant had previously performed a variety of occupations which included washing dishes, delivering handbills, car salesman, delivery man, loader and unloader of trucks, concrete truck driver/jackhammer operator, furniture salesman, painting and remodeling, and semi-truck driver. From 1973 to 1981, claimant was essentially disabled as he could not perform any type of employment. However, after his fourth back operation in 1977, he was able to rehabilitate himself and return to work symptom-free until February 20, 1991, when this accident occurred.

During the evaluation process, the claimant was observed as being in great distress. He walked with a marked, unusual gait and was in significant pain while in a sitting posture. Claimant was polite and cooperative, but was very emotionally distressed during the evaluation. He was only able to tolerate either sitting or standing for ten to fifteen minute intervals because of the pain.

After taking into consideration all of the information accumulated concerning the claimant's vocational capabilities, Mr. Ogren concluded that the claimant was totally disabled from the competitive labor market. His definition of competitive labor market and the open labor market were synonymous. Although the claimant's test results indicated that he possessed the ability for re-training, it is doubtful he could function adequately in

an academic setting or in a competitive sedentary work situation due to reported pain, discomfort, and demonstrated emotional condition.

With respect to the claimant's ability to work at a comparable wage, Mr. Ogren opined that claimant is not competitively employable unless a highly-selected situation was found. He defined a highly-selected situation as meaning an employment opportunity from a person feeling sorry for him, a relative, or a spouse. Based on both the medical reports and the claimant's own reported limitations, the claimant is only capable of finding a job from minimum wage to $5.00 per hour. Based only on the medical reports, the claimant can return to a sedentary occupation using transferrable skills in sales to a $6.00 per hour job. When one compares a $5.00 and $6.00 per hour wage to the $8.00 per hour pre-injury wage, a twenty-five percent (25%) to thirty-seven and one-half percent (37.5%) wage loss would result.

Utilizing Dr. Kaufman's restrictions after the third back surgery in 1973 of a thirty-five (35) pound lifting limit and no repetitive lifting, bending, and stooping, Mr. Ogren opined that the claimant had lost sixty-seven percent (67%) of his ability to perform work in the open labor market prior to his injury of February 20, 1991. After this injury, claimant has lost an additional fifteen percent (15%) for a total loss of eighty-two percent (82%). This leaves eighteen percent (18%) of the jobs he can perform in the open labor market. However, using Dr. Fleming's present restrictions, he could only perform work for a two to four hour interval. Taking these restrictions into consideration, Mr. Ogren did not think anyone would hire the claimant.

Jerry D. Hardin, M.S., Human Resource Consultant, was the second vocational expert to interview the claimant and express an opinion on work disability. Mr. Hardin, at the request of the claimant's attorney, on January 12, 1992, personally interviewed the claimant and obtained information from him concerning his education, training, and past work experience. In addition, he was supplied with medical reports from Forney W. Fleming, M.D., the claimant's treating physician from March 26, 1991, through December 6, 1991. Utilizing the history the claimant gave him, the medical reports supplied, and Appendix C of the Dictionary of Occupational Titles, it was Mr. Hardin's opinion that the claimant's ability to perform work in the open labor market and to earn comparable wages had been reduced by one-hundred percent (100%) because of the injury he sustained at work and the resulting restrictions imposed.

Mr. Hardin also was questioned in reference to the claimant's ability to perform work in the open labor market prior to his injury of February 20, 1991, based on Dr. Kaufman's restrictions of a 35 pound lifting limit and no repetitive lifting, bending, and stooping. Mr. Hardin concluded that these restrictions would have placed the claimant in the light work category. Accordingly, prior to his latest injury, he would have lost seventy percent (70%) of his ability to perform work in the open labor market. However, Mr. Hardin further concluded that in his opinion the claimant did not have permanent restrictions as a result of his previous back injuries and surgeries. The claimant had demonstrated for a 10-year

period that he could successfully perform work outside his restrictions without problems, which demonstrated that the restrictions were not permanent in nature.

The Assistant Director in this case awarded the claimant temporary total disability payments not to exceed $100,000.00 or until further order of the Director. In addition, he awarded psychiatric evaluation and treatment plus referral to a chronic pain clinic. The claimant in this case was last seen by Dr. Fleming, his treating physician, on August 5, 1991 and at that time Dr. Fleming rated the claimant for functional impairment, opined that claimant was not capable of any type of employment and further concluded that it was unlikely that the claimant's condition would change in the future. K.S.A. 1992 Supp. 44-510c(b)(2) defines temporary total disability:

> "Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment."

The purpose of temporary total disability compensation is to compensate an injured worker during the time it takes the worker to recover from the injury. When a worker's condition becomes medically stationary or stable or when he reaches maximum medical improvement, he is no longer temporarily disabled. Crabtree v. Beech Aircraft Corp., 229 Kan. 440, 444-445, 625 P.2d 453 (1981). Both Dr. Fleming and Dr. Rawcliffe, who presented testimony in this case, rated the claimant for permanent functional disability. Dr. Fleming released the claimant on August 5, 1991, concluding that it was unlikely that the claimant's condition would change. Even though Dr. Fleming recommended further medical treatment in the form of a chronic pain clinic and Dr. Rawcliffe recommended a psychiatric evaluation, neither expressed a medical opinion that such treatment would improve the claimant's condition. The Assistant Director's Award of temporary total disability benefits is inappropriate as the evidence has established that the claimant has met maximum medical improvement and his condition is, therefore, permanent and not temporary.

The Appeals Board finds the appropriate standard to measure the claimant's disability in the instant case is provided in K.S.A. 1992 Supp. 44-510c(a)(2) as follows:

> "Permanent total disability exists when the employee, on account of injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall in the absence of proof to the contrary, constitute permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts."

The claimant's injuries are not injuries specifically listed in the statute which would constitute permanent total disability. Accordingly, permanent total disability has to be determined by the particular facts of this case.

The term "substantial and gainful employment" is not defined in the Kansas Workers Compensation Act. Until recently, the Kansas Appellate Courts had not provided such a definition. However, a recent decision by the Kansas Court of Appeals, Wardlow v. ANR Freight Systems, Inc., No. 69,760 (designated for publication 12-23-93), held:

> "...The trial courts finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with the legislative intent."

The Appeals Board on review of an award by an Administrative Law Judge has the authority to increase or decrease an award of compensation. K.S.A. 44-551(b)(1). As a trier of fact, the Appeals Board's function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991). The evidence in this case has established that the claimant's work connected injury has left him with permanent continuing pain and muscle spasms in the low back, he walks with a limp and his present overall condition is worse than it was in the 1970's when he was completely unable to work. Dr. Fleming, his treating physician, has placed permanent restrictions requiring a sit-down job, hours limited to two to four hours per day, no lifting, bending or twisting, and employment would have to be under the condition that he could stretch and stand. Dr. Fleming testified that the claimant is not capable of securing any type of employment. Dr. Rawcliffe imposed restrictions of sedentary work category with occasionally lifting up to 10 pounds and frequently lifting of no more than light weight articles. Claimant's educational background is a tenth grade education with a GED acquired in 1969 and his employment history has consisted primarily of heavy manual labor type of jobs. He is not a candidate for retraining or competitive sedentary work because of his reported pain, discomfort and demonstrated emotional condition. Both vocational experts who testified in this case concluded that taking into consideration the claimant's education, training, past work experience and medical restrictions imposed by the physicians, the claimant is totally disabled from the competitive labor market.

The only evidence that was presented as to a job that the claimant was able to perform was a sedentary job for two to four hours per day at $5.00 per hour. The Appeals Board finds that this is not a job which is contemplated by the Kansas Workers Compensation Act as being substantial and gainful employment. The Appeals Board therefore finds and concludes, after reviewing the whole evidentiary record, that the persuasive credible evidence has established that the claimant, as a result of his accidental injury that occurred on February 20, 1991 while employed by the respondent, is permanently and totally disabled from engaging in any substantial and gainful employment.

(3) The claimant is entitled to ongoing medical benefits with a qualified physician of the respondent's choice and any referrals therefrom.

Claimant testified that he has continuing pain and muscle spasms that require him to take pain medication. Both physicians who testified in this case recommended either ongoing medical treatment in the form of a chronic pain clinic or psychiatric evaluation and treatment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board, that the award of Assistant Director William Morrissey dated December 13, 1993, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Weldon Aaron, and against the respondent, Gary L. Bailey, d/b/a Independent Haulers, and its insurance carrier, Insurance Company of North America.

The claimant is entitled to 23 weeks of temporary total disability at the rate of $219.13 per week or $5,039.99 followed by $219.13 per week until $119,960.01 is paid for permanent total disability total award of $125,000.00.

As of March 18, 1994, there will be due and owing to the claimant 23 weeks temporary total compensation at $219.13 per week in the sum of $5,039.99 plus 189.57 weeks permanent total compensation at $219.13 per week in the sum of $41,540.47 for a total due and owing of $46,580.46 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of $78,419.54 shall be paid at $219.13 per week until paid in full or until further order of the Director.

The claimant is awarded unauthorized medical up to the $350.00 statutory maximum upon proper presentation of expenses.

The claimant is awarded ongoing medical benefits with a physician of the respondents choice without application and any referrals therefrom.

The claimant's contract of employment with his attorney is approved subject to provisions of K.S.A. 44-536.

As per the stipulation entered into by the parties, the Kansas Workers Compensation Fund shall reimburse to the respondent seventy-five percent (75%) of any and all compensation, medical expenses, and court costs paid in this claim.

Fees and expenses of the administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

Barber & Associates	
Transcript of Regular Hearing	$202.75
Continuation of Regular Hearing	225.60
	$428.35
Kelley, York & Associates, Ltd.	
Deposition of Forney Fleming, M.D.	$177.90
Deposition of Jerry Hardin	230.95
Deposition of Robert Rawcliffe, M.D.	135.35
Deposition of Weldon Aaron	203.30
	$747.50
Nora Lyon & Associates, Inc.	
Deposition of Kenneth Ogren	$120.00
Satterfield Reporting Service	
Deposition of Gary L. Bailey	$170.00

IT IS SO ORDERED.

Dated this ____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: G. Knute Fraser, 1020 N. Main, #C, Wichita, KS 67203
W. John Badke, II, 300 W. Douglas, Suite 500, Wichita, KS 67202-2902
John C. Nodgaard, 300 W. Douglas, Suite 330, Wichita, KS 67202
William Morrissey, Assistant Director
George Gomez, Director

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Claimant	)	
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Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	
	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

NUNC PRO TUNC ORDER

ON review of the Award entered by the Appeals Board in this case on March 18, 1994, it appears that there was a calculation error in the "Award" portion of the Appeals Board decision. That section of the Award is therefore amended to read as follows:

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board, that the award of Assistant Director William Morrissey dated December 13, 1993, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Weldon Aaron, and against the respondent, Gary L. Bailey, d/b/a Independent Haulers, and its insurance carrier, Insurance Company of North America.

The claimant is entitled to 23 weeks of temporary total disability at the rate of $219.13 per week or $5,039.99 followed by $219.13 per week until $119,960.01 is paid for permanent total disability total award of $125,000.00.

As of March 18, 1994, there will be due and owing to the claimant 23 weeks temporary total compensation at $219.13 per week in the sum of $5,039.99 plus 137.43 weeks permanent total compensation at $219.13 per week in the sum of $30,115.04 for a total due and owing of $35,155.03 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of $89,844.97 shall be paid at $219.13 per week until paid in full or until further order of the Director.

The claimant is awarded unauthorized medical up to the $350.00 statutory maximum upon proper presentation of expenses.

The claimant is awarded ongoing medical benefits with a physician of the respondents choice without application and any referrals therefrom.

The claimant's contract of employment with his attorney is approved subject to provisions of K.S.A. 44-536.

As per the stipulation entered into by the parties, the Kansas Workers Compensation Fund shall reimburse to the respondent seventy-five percent (75%) of any and all compensation, medical expenses, and court costs paid in this claim.

Fees and expenses of the administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

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Nora Lyon & Associates, Inc.
Deposition of Kenneth Ogren $120.00

Satterfield Reporting Service
Deposition of Gary L. Bailey $170.00

IT IS SO ORDERED.

Dated this ____ day of March, 1994.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
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c: G. Knute Fraser, 1020 N. Main, #C, Wichita, KS 67203
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